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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Placer)

THE PEOPLE,

Plaintiff and Respondent,

v.

BRYAN ANTHONY COBERLEY,

Defendant and Appellant.

C086701

(Super. Ct. No. 62133153)

Defendant Bryan Anthony Coberley appeals the trial court's order denying his request to dismiss a three-year sentence enhancement imposed under Health and Safety Code section 11370.2.¹ On appeal, defendant characterizes his request as a Penal Code section 1203.3 motion for early termination of the mandatory supervision portion of his split sentence in the interests of justice. He argues the trial court erred in not holding an

¹ Undesignated statutory references are to the Health and Safety Code.

open hearing, in failing to expressly address the merits of the Penal Code section 1203.3 argument, and in denying his motion.

We disagree and affirm the trial court's order.

I. BACKGROUND

In September 2014, defendant was charged with transportation of a controlled substance for sale (§ 11352, subd. (a)—count one), possession of a controlled substance for sale (§ 11351—count two), possession of a controlled substance (§ 11377, subd. (a)—count three), and destruction of evidence (Pen. Code, § 135—count four). As to counts one and two, it was also alleged that defendant had a prior conviction for a controlled substance offense. (§ 11370.2, subd. (a).) As to counts one through three, it was alleged that he had suffered a prior prison term. (Pen. Code, § 667.5, subd. (b).)

In March 2015, defendant pleaded no contest to possession of a controlled substance for sale (count two) and admitted the prior controlled substance enhancement associated with that count in exchange for dismissal of the remaining charges. He received a sentence of six years in county jail, to be served half in custody and half under mandatory supervision.

On April 3, 2017, the probation department filed a petition to revoke mandatory supervision, which it later amended on November 9, 2017. Defendant denied the allegations of these petitions.

On December 5, 2017, defendant filed a request to modify his sentence on the basis that the court retained jurisdiction pursuant to Penal Code sections 1203.2 and 1203.3 and amendments to section 11370.2. Defendant argued that, because of recent amendments to the law, the portion of his sentence imposed under 11370.2 was no longer valid. He requested the court dismiss the section 11370.2 enhancement and modify his sentence accordingly. The People opposed the motion, arguing the recent legislative amendments were not applicable to defendant's final judgment. Defendant argued in

reply that the amendments should be applied retroactively, that his judgment was not final, and that equal protection required he be allowed to benefit from the amendments.

The trial court met with counsel in chambers on January 23, 2018. The same day, the court indicated in open court that it understood the issue and would conduct more research, setting the matter for February 6, 2018, for the court's ruling. Prior to the February 6, 2018, hearing, the trial court denied defendant's request to strike the enhancement imposed under 11370.2 in a written ruling. The court found the amendments to section 11370.2 did not apply to defendant's final judgment and he had not established an equal protection violation. Defendant's attorney did not object to the ruling or request further argument on the defendant's motion. Defendant filed a timely notice of appeal.

II. DISCUSSION

A. *Defendant's Motion to Modify His Sentence*

Defendant argues the trial court erred in not holding an open hearing, in failing to expressly address the merits of the Penal Code section 1203.3 argument, and in failing to grant his motion. We disagree.

While defendant's motion seeking sentence modification referenced the trial court's general authority to modify his sentence under Penal Code section 1203.3, he did not advance a substantive argument that the trial court should exercise its discretion to dismiss the remaining portion of his mandatory supervision *in the interests of justice*. Rather, defendant requested the court dismiss his section 11370.2 sentence enhancement and modify his sentence because amendments to section 11370.2 had made this portion of his sentence illegal. The amendments to 11370.2, however, did not authorize retroactive application to final cases. (§ 11370.2, as amended by Stats. 2017, ch. 677, §1.) And defendant's motion to modify his sentence did not argue the trial court's authority to modify sentences under Penal Code section 1203.3 allowed the trial court to give the recent amendments of section 11370.2 retroactive application.

If we presume that defendant's reference to the trial court's continuing power under Penal Code section 1203.3 to "revoke, modify, or change the conditions of the court's order suspending the execution of the concluding portion of the supervised person's term" framed an argument that defendant's mandatory supervision should be terminated *in the interests of justice* in light of amendments to section 11370.2, defendant has waived his contentions of trial court error by failing to object below. (See *People v. Tillman* (2000) 22 Cal.4th 300, 302-303 [failure to object and request correction waives challenge to trial court's discretionary sentencing choice].)

Even if not waived, we do not believe the trial court's denial of such a request was an abuse of the trial court's discretion. (*People v. Catalan* (2014) 228 Cal.App.4th 173, 179 [trial court's modification of mandatory supervision is reviewed for an abuse of discretion].) The trial court's ruling expressly recognized defendant was released to mandatory supervision on March 6, 2017, and that on November 2, 2017, he was arrested for violating that mandatory supervision, a violation that was still pending before the court.² Given the continuing need for supervision and the court's rejection of defendant's reasons for modification, the court was well within its discretion in denying defendant's request to modify his sentence.

B. Correction of the Abstract

The People have highlighted a clerical error in the abstract of judgment that identifies the wrong subdivision for defendant's sentencing enhancement. Defendant admitted to a prior conviction under section 11370, subdivision (a), not subdivision (c) as the abstract currently reads. We can and will correct this clerical error. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.)

² The probation department filed its first petition to revoke his mandatory supervision on April 3, 2017, within a month of defendant's release from jail.

III. DISPOSITION

The trial court is directed to prepare a corrected abstract of judgment to reflect a sentencing enhancement for a prior conviction under section 11370, subdivision (a), which shall be forwarded to the Department of Corrections and Rehabilitation. The trial court's order denying defendant's motion to modify his sentence is affirmed.

/S/

RENNER, J.

We concur:

/S/

MAURO, Acting P. J.

/S/

DUARTE, J.